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State Surveillance and Social Democracy: Lessons after the Investigatory Powers Act 2016

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I. Introduction

This chapter examines the passage and content of the Investigatory Powers Act 2016 (IPA) to argue that social democrats are failing to address threats to civil liberties – to their detriment. For Ewing, in a social democratic state, constitutional authority derives from the sovereignty of the people and vests in elected representatives. Its goals are 'the promotion of the social, economic and cultural well-being of citizens' and those socialist reforms are to be done consistently with civil and political rights.[1] Thus, social democracy entails 'the extension of liberal principles to different sites of struggle'.[2] As a result there is a strong socio-economic focus and it is therefore unsurprising that many of the chapters in this book focus, for example, on labour law. However, to borrow a phrase from Ewing and Gearty 'the struggle for civil liberties'[3] remains vital. This chapter argues that the failure by the Labour Party (and other social democrats) to get to grips with the IPA illustrates an ambivalence towards civil liberties. This ambivalence persists despite a history of state misuse of powers against social democrats, and despite (earlier) vocal opposition to the legislation by those who were party leaders while the Bill became law.

This chapter proceeds with the following parts. Part II presents a historical analysis as the foundation for the study. It intertwines two histories: the rise of state surveillance capacity, in particular surveillance of telecommunications, in the UK; and the legal protection of civil liberties and its relationship with surveillance law. Part III examines the origins and adoption

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* Thanks to Phoebe Hirst for research assistance and the editors for their comments.

[1] KD Ewing, 'Democratic Socialism and Labour Law' (1995) 24 *Industrial Law Journal* 103.

[2] KD Ewing, 'Jeremy Corbyn and the Law of Democracy' (2017) 28 *King's Law Journal* 343.

[3] KD Ewing and CA Gearty, *The Struggle for Civil Liberties: Political Freedom and the Rule of Law in Britain, 1914-1945* (Oxford, OUP, 2000).

of the IPA. It demonstrates how, despite significant political review, and civil society engagement, there was little prospect of significant changes in Parliament because of the acquiescence of the Labour Party with the government's Bill. Part IV considers the fruit of this failure: weak protections for lawyers, journalists, and trade unionists. The final part highlights ongoing litigation and the potential future evolution of surveillance. The IPA demonstrates 'the re-assertion of the surveillance realist insistence that there is no alternative'.[4] This perception helps to perpetuate profound legal powers of surveillance. All of this is made possible, in part, by a failure to protect the civil liberties which underpin all progressive struggles.

II. State Surveillance, Civil Liberties & Social Democracy

Three decades ago Ewing and Gearty described the tension between democracy and state surveillance of communications: 'although it may be necessary to tolerate the practice, it should be conducted only in exceptional and highly controlled circumstances under which there is adequate scrutiny and review by institutions independent of the executive branch of government'.[5]

Social democrats, and those on the Left in general, have had good reason to be sceptical.[6] In the last century, those who identified as Communist or who were under suspicion of it, came under particular scrutiny. By 1952 the Security Service (MI5) had identified 90 per cent of the Communist Party of Great Britain's 35,000 members. As a *Guardian* headline put it, 'Being a Communist was all it took'.[7] Prior to World War II, 'civil liberties politics appeared to offer some obvious shared ground between socialist and liberal principles, potentially

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[4] L Dencik, 'Surveillance Realism and the Politics of Imagination: Is There No Alternative?' (2018) 1 *Krisis* 31, 40.

[5] KD Ewing and CA Gearty, *Freedom Under Thatcher: Civil Liberties in Modern Britain* (Oxford, OUP, 1990) 48

[6] Ewing and Gearty, *The Struggle for Civil Liberties* (n 3) 48.

[7] M Kettle, 'Historians' work meant little to an MI5 obsessed with cold-war communists' *The Guardian* (London, 24 October 2014). See C Andrew, *The Defence of the Realm: The Authorised History of MI5* (London, Penguin, 2012) and Ewing and Gearty, *The Struggle for Civil Liberties* (n 3) 112–118.

offering a unifying theme for adherents of such ideologies'.[8] However, as the century developed, a gap grew between those who were willing to pay the price of such associations and those who were not. Suspicion of the Communist Party of Great Britain (CPGB) influence over organisations such as the National Council of Civil Liberties (NCCL – now Liberty), the conflation in the minds of the Metropolitan Police of Communist and anti-fascism, and Cold War ideologies all contributed to a breakdown in the solidarity between civil libertarians and social democrats.[9]

At the same time the state's capacity for surveillance grew. Telecommunications surveillance is not the only form of state surveillance.[10] However, it merits particular scrutiny for several reasons. First, it is covert (and sometimes secret). Thus, the subject of a covert surveillance operation will not be aware of the fact. And, in the case of secret surveillance, the existence of a power to conduct such surveillance might not even be known. In *Klass,* one of the earliest judgments on surveillance, the European Court of Human Rights (ECtHR) held that '[p]owers of secret surveillance of citizens, characterising as they do the police state, are tolerable under the Convention only in so far as strictly necessary for safeguarding the democratic institutions'.[11]

Second, covert surveillance often arises in the context of state regulation of political opposition. A recent database of another covert surveillance power – undercover policing – identifies targets including campaigns for animal rights and the environment, or a wide range of 'anti-' campaigns: apartheid, capitalism, nuclear power/weapons, racism, and war.[12]

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[8] C Moores, 'From Civil Liberties to Human Rights? British Civil Liberties Activism and Universal Human Rights' (2012) 21 *Contemporary European History* 169, 171.

[9] Ibid, *passim*.

[10] See S Chesterman, *One Nation Under Surveillance: A New Social Contract to Defend Freedom Without Sacrificing Liberty* (New York, OUP, 2013) 131–156.

[11] *Klass v Germany* (1978) 2 EHRR 214, para 42.

[12] R Evans, 'UK political groups spied on by undercover police – search the list' *The Guardian* (London, 13 February 2019).

Third, telecommunications surveillance at the forefront of the development of the law. The history is one of state empowerment of intelligence agencies, litigation to vindicate civil liberties, and imperfect political responses to legalise identified rights violations.

The starting point for the contemporary legal framework is the reaction to the *Malone* judgment of the European Court of Human Rights (ECtHR). Mr James Malone was an antiques dealer under suspicion of crime. His telephones were tapped. In the national court, when Sir Robert Megarry VC could find no 'breach of the law' by the phone-tapping, he concluded that no authority in law was necessary. The European Court of Human Rights disagreed, and found a violation of Article 8, ECHR, on the grounds that the interference with privacy was not 'in accordance with law'.[13] The legislative response was the Interception of Communications Act 1985 – which provided the necessary authority.

In 1989, Patricia Hewitt and Harriet Harman of the NCCL, were in pursuit of relief from the European Commission on Human Rights from surveillance without a basis in law. To address the matter, the government published a draft statute which became the Security Services Act 1989.[14] Five years later, the Intelligence Services Act 1994 gave statutory legal basis to the activities of the Secret Intelligence Service (MI6) and Government Communications Headquarters (CGHQ), and brought about certain arrangements for oversight.[15] The cases illustrate the tendency of UK governments to only address the issues of lawfulness and oversight when litigation makes it unavoidable.

In contrast to the earlier cases, *Kennedy* offers a counter-point, in which the UK legal framework was upheld.[16] The ECtHR had to consider the operation of the Investigatory Powers Tribunal which was established by the Regulation of Investigatory Powers Act 2000 to hear complaints against the intelligence services. After a complaint to the IPT about potential surveillance Mr Kennedy was told only that there was no determination in his favour. This meant he was either not under surveillance or, in the IPT's view, any surveillance was lawful. The ECtHR held that there was no violation of Article 8 ECHR when the law was read

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[13] *Malone v United Kingdom* (1984) 7 EHRR 14.

[14] *Hewitt and Harman v United Kingdom* (1992) 14 EHRR 657.

[15] For a contemporaneous critique see: J Wadham, 'The Intelligence Services Act 1994' (1994) *MLR* 916.

[16] *Kennedy v United Kingdom* (2011) 52 EHRR 4.

alongside the Code of Practice. There is a tension here with the values of accountability which the rule of law promotes. Although the interference with Article 8 had a basis in law (ie the statute and Code of Practice) it was not, for Mr Kennedy, clear whether or not he had been subject to surveillance.

It may be that *Kennedy* was correct and the IPT scheme established by RIPA is in compliance with the Convention. RIPA was, nevertheless, much-maligned even before the Snowden revelations. In the words of David Anderson QC it was 'incomprehensible to all but a tiny band of initiates'.[17] In the debate on his report, *A Question of Trust*, the Shadow Home Secretary Yvette Cooper MP admitted that the only way she could understand the law was 'with a wet towel wrapped around [her] head'.[18] This was the state of play as the IP Bill was about to be published.

What to make of this from the point of view of social democracy? Many powers are used in the absence of legal authority. This runs contrary to the idea of the constitutional authority of the people-in-Parliament under Ewing's conception of social democracy. Several of these powers have been upheld by the national judiciary before being found contrary to the UK's international legal obligations by a supranational judiciary. Furthermore, when the breaches were identified, the response of the legislature was, by and large, to alter the law not to protect civil liberties but to authorise the surveillance powers. In terms of the form of the law, the development of surveillance law offers little support for the claim that the legislature will offer better protection than the judiciary. In terms of the substantive content of such laws, legislation which provides powers that are open to political abuse ought to be of concern to those who have been subject to such abuses – such as social democrats.

The ECHR, of course, contains civil and political rights rather than social and economic ones. As Gearty, who is largely supportive of the ECHR and the HRA, notes the post-war constitutional settlement in Europe allows social democracy only of 'a fairly timid sort'.[19] The

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[17] D Anderson QC, *A Question of Trust: Report of the Investigatory Powers Review* (London, TSO, 2015), para 35.

[18] *Hansard*, 25 June 2015, vol 597, col 1086.

[19] CA Gearty, 'Neo-democracy: 'Useful Idiot' of neo-liberalism?' (2016) 56 *British Journal of Criminology* 1087, 1096.

HRA was brought about to fulfil the legacy of former Labour Party leader John Smith.[20] It afforded greater protection to civil rights and political freedoms in domestic law but had little impact on social and economic rights.[21] Indeed, social and economic rights have been in decline in UK and across Europe during the HRA's lifetime.[22] And the Party which legislated for the HRA became increasingly antipathetic towards it over it lifetime of the Blair Governments.[23]

Ewing has long been critical of both the ECHR and the EU Charter. The former, he argues, protects commercial speech and private property. The latter, even more contrarily to social democracy, includes the right to conduct business.[24] He is also sceptical of the judicial protection of rights as a vehicle for progressive politics. A social democratic model relies on Parliament to protect rights.[25] And he warns against 'the empowerment of lawyers as a class… self-appointed, self-regulating, and accountable to no-one outside their own community'.[26]

Yet lawyers (and their clients) have been responsible for the development of constraints on the executive/legislature. The ECHR and EU Charter may have effect in the UK because of Acts of Parliament: the HRA and European Communities Act 1972 respectively. But it is the judiciary which has taken the opportunity the legislation gave them to resist legal and operational overreach by the legislature and executive.

The litigation set out both above and below centres on the right to privacy found in Article 8, ECHR. However, a range of other rights are also engaged by telecommunications surveillance. Article 10, ECHR, on freedom of expression, protects journalists. Article 11,

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[20] See F Klug, *Values for a Godless Age: The Story of the United Kingdom's New Bill of Rights* (London, Penguin, 2000).

[21] Ewing, 'Democratic Socialism and Labour Law' (n 1) 108–109.

[22] KD Ewing, 'The Death of Social Europe' (2015) 26(1) *King's Law Journal* 76.

[23] See KD Ewing, *Bonfire of the Liberties: New Labour, Human Rights, and the Rule of Law* (Oxford, OUP, 2010).

[24] Ewing, 'Jeremy Corbyn and the Law of Democracy' (n 2) 346, 357.

[25] Ewing, 'Democratic Socialism and Labour Law' (n 1) 110.

[26] Ewing, 'Jeremy Corbyn and the Law of Democracy' (n 2) 357.

ECHR on freedom of assembly offers protections for trade unions and other political groups. Article 14, ECHR sets out a prohibition on discrimination which may also be relevant.[27]

The EU Charter is engaged because national legislation which is 'within the scope of EU law' must be compatible with the Charter. This compatibility is overseen by the EU Court of Justice (CJEU).[28] The standards are, by and large, in concordance with the ECHR. Article 7 of the EU Charter is near-identical to Article 8, ECHR. Article 8, EU Charter adds to the general privacy protection with more explicit data protection rights. The CJEU's supervisory jurisdiction, used to significant effect in *Digital Rights Ireland*,[29] and then in *Watson*,[30] has put it at the forefront of the debate on surveillance. Those judgments are set out later.

The rationalisation of telecommunication surveillance powers results, at the very least, from a 'dialogue'[31] between the judiciary and the legislature/executive. Part III of this chapter examines the adoption of the IPA. The principal opposition to the Act came not from those advocates of social democracy but rather from 'civil libertarians' – in particular privacy activists. This ought to be of concern because, as Part IV demonstrates, the law has a detrimental impact on three professions which could play a role in achieving social democracy: lawyers, journalists, and trade unionists.

III. The Investigatory Powers Act 2016

The IPA has put the UK at the forefront of the development of lawful surveillance powers. It is in part a response to the revelations of Edward Snowden.[32] In 2013, Snowden revealed

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[27] P Bernal, 'Data gathering, surveillance and human rights: recasting the debate' (2016) 2 *Journal of Cyber Policy* 243, 244.

[28] See D Anderson and CC Murphy 'The Charter of Fundamental Rights' in A Biondi, P Eeckhout and S Ripley (eds) *EU Law after Lisbon* (Oxford, OUP, 2012).

[29] C-293/12 *Digital Rights Ireland* EU:C:2014:238.

[30] Joined Cases C-203/15 and C-685/15 *Tele2 Sverige* and *Watson v GCHQ*, EU:C:2016:970.

[31] See A Young, *Parliamentary Sovereignty and the Human Rights Act* (Oxford, Hart Publishing, 2008) 10–12.

[32] A Hintz and I Brown, 'Digital Citizenship and Surveillance| Enabling Digital Citizenship? The Reshaping of Surveillance Policy After Snowden' (2017) 11 *International Journal of Communication* 782, 792.

widespread digital surveillance by the US Government and its allies. These allies, in particular, were in the 'Five Eyes' states: Australia, Canada, New Zealand, the UK (and the US).[33] For parliamentarians, Snowden's revelations were an indication that their knowledge of state surveillance capacities and operations was limited. For the public, there was outrage at the extensive surveillance of their telecommunications. However, unsurprisingly, the UK and other governments did not welcome the publication by journalists of extensive classified materials. Prime Minister David Cameron warned of the potential for government to intervene: 'If [journalists] don't demonstrate some social responsibility it will be very difficult for government to stand back and not to act'.[34] Implicit, of course, in this threat was a denial that publication was in itself a fulfilment of the journalists' social responsibility.

The Snowden revelations are one half of the story. The fate of the Data Retention Directive is the other half. The 2014 judgment of the CJEU in *Digital Rights Ireland* held that the Directive was unlawful. The Directive had required the retention, and making available to law enforcement authorities, of telecommunications data across the EU. CJEU case-law continues to develop but in that first case the court set out the need for such powers to be restricted and subject to appropriate oversight.[35] To avoid any doubt over the legal basis for data retention and access in the UK, Parliament enacted the Data Retention and Investigatory Powers Act 2015 (DRIPA). This legislation gave the powers a new basis in national law. It too was the subject of a successful challenge to its lawfulness brought, initially, by two MPs: Tom Watson (Labour Party) and David Davis (Conservative Party).[36] By the time the case was resolved, DRIPA had been replaced by the IPA.

DRIPA anticipated its own demise. It included a requirement that the Independent Reviewer of Terrorism Legislation, David Anderson QC, conduct a review of 'the operation

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[33] See the symposium in 2020(1) *Common Law World Review* for a discussion.

[34] 'Cameron Says May Act Against Press Over Spy Leaks' (*Reuters*, 28 October 2013).

[35] CC Murphy, *EU Counter-terrorism Law: Pre-emption and the Rule of Law* (Oxford, Hart, Expanded Paperback Edition 2015) 257–263.

[36] Upon his appointment as Secretary of State for Exiting the European Union, David Davis MP withdrew from the litigation. Open Rights Group and Privacy International were interveners.

and regulation of investigatory powers.[37] It included a sunset clause to repeal it on 31 December 2016.[38] Anderson's report was therefore always likely to significantly influence DRIPA's replacement. The report, *A Question of Trust*, runs to 373 pages (including annexes) and offers a comprehensive assessment of the legal, ethical, and technological questions which surround telecommunications surveillance. Two other reports were also influential. *Privacy and Security: A Modern and Transparent Legal Framework* was published by the Intelligence and Security Committee of Parliament.[39] The third, *A Democratic Licence to Operate*, was written by a panel appointed by the Royal United Services Institute.[40] In addition, several parliamentary committees (including the ISC) scrutinised and reported on the draft legislation.[41]

Not all the evidence which influenced the legislation has been published. Sir Nigel Sheinwald undertook confidential work for the Prime Minister in his role as the Special Envoy on Intelligence and Law Enforcement Data Sharing.[42] A two-page summary of his work was published. The recommendations focus on improving bilateral co-operation, Mutual Legal Assistance Treaties, and the development of an international legal framework. The Independent Reviewer conducted a review of the operational case for bulk data collection.[43] This use of the office of Independent Reviewer was possible because of his access to classified materials.[44] It

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[37] DRIPA 2015, s 7.

[38] DRIPA 2015, s 8(3).

[39] Intelligence and Security Committee of Parliament, *Privacy and Security: A Modern and Transparent Legal Framework* (HC 2015, 1075).

[40] RUSI, *A Democratic Licence to Operate* (London, RUSI, 2015).

[41] Anderson points to reports on the Bill by the ISC, Science and Technology Committee, Joint Bill Committee, a Public Bill Committee, Joint Committee on Human Rights, Constitution Committee, and Delegation and Regulatory Reform Committee. See D Anderson QC, 'The Investigatory Powers Act 2016 – an exercise in democracy' (*David Anderson QC*, 3 December 2016) www.daqc.co.uk/2016/12/03/the-investigatory-powers-act-2016-an-exercise-in-democracy/.

[42] Sir N Sheinwald, *Summary of the Work of the Prime Minister's Special Envoy on Intelligence and Law Enforcement Data Sharing – Sir Nigel Sheinwald* (London, The Cabinet Office, 2015).

[43] D Anderson, *Report of the Bulk Powers Review* (Cmd 9326, 2016).

[44] See in general D Anderson, 'Shades of Independent Review' in G Lennon, C King and C McCartney (eds), *Counter-terrorism, Constitutionalism, and Miscarriages of Justice: A Festschrift for Professor Clive Walker* (Oxford, Hart Publishing, 2019).

was a successful strategy by the government, both because of the office's access to classified materials, and the high esteem in which Anderson was held across the political spectrum. This reliance on 'hybrid institutions' such as the Independent Reviewer (and perhaps the Special Envoy) indicates a limitation on Parliament's capacity to perform its function –which exists because of the necessary secrecy which national security demands.[45]

The role of global civil society in the regulation of communications is significant. They are 'increasingly part of multistakeholder processes that expand policy authority beyond governments'.[46] The most prominent example is that of the Internet Corporation for Assigned Names and Numbers (ICANN) in the regulation of domain names.[47] However, the role also involves 'normative interventions' – lobbying – governments on law and regulation. The prospect of influence on the content of legislation (rather than just its existence or not) has led to a shift in some civil society strategies – away from outright opposition and towards constructive collaboration.[48] However, these groups did not always get the 'traction' they sought. The civil society response to the Investigatory Powers Bill was strong and, to an extent, co-ordinated. Organisations including Liberty, Big Brother Watch, and Privacy International were part of a broader campaign entitled *Don't Spy On Us*. The campaign described itself as 'a coalition of the most influential organisations who defend privacy, free expression and digital rights in the UK and in Europe'.[49] The trade union movement appears to have left the lobbying to more specialist groups. TUC Congress in 2016 'congratulate[d]' the NUJ on the

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[45] PF Scott, 'Hybrid institutions in the national security constitution: the case of the Commissioners' (2019) 39 *Legal Studies* 1. On the Independent Reviewer's role see: D Anderson QC, 'The Independent Review of Terrorism Laws' (2014) *Public Law* 403.

[46] Hintz and Brown, 'Digital Citizenship and Surveillancel Enabling Digital Citizenship? The Reshaping of Surveillance Policy After Snowden' (n 32) 784.

[47] See: www.icann.org.

[48] Ibid, 794.

[49] See: www.dontspyonus.org.uk

amendments it secured to the Bill.[50] Indeed, the NUJ remains active in resistance to the legislation – in particular via participation in strategic litigation.[51]

Anderson applauded the legislative process.[52] He wrote that the Act 'gets the big things right' and that it is a 'victory for democracy and the rule of law'.[53] To support this conclusion he cites the numerous parliamentary committee reports on the Bill, as well as the role of civil society, and public commentators.[54] This is persuasive, to an extent, and yet in a 2017 study Hintz and Brown found most of their interviewees agreed that 'a true public debate has not yet taken place'.[55] Bernal suggests the debate post-Snowden has been 'limited and miscast'.[56] He observes that, despite the volume of the conversation, there remains unhelpful disagreement on what constitutes surveillance, the distinction between 'metadata' and content data, and the impact of both covert and overt surveillance.[57] The breadth of the law, in terms of the agencies which are empowered by it, the powers which it contains, and the potential targets of those powers, is one limitation on the effectiveness of the parliamentary process. A challenge for those organisations was the sheer scope of the Bill. Given the limited time for the consideration of any Bill in Parliament, an omnibus Bill such as this, would be a serious challenge. It is for this reason that calls to also revise and re-codify other investigatory powers, such as those in the Police and Criminal Evidence Act 1984, as part of the process, were rightly resisted.

The legal and technological complexity of many of the Act's provisions adds to the challenge to adequately scrutinise it. The Act has been commended for being 'technology-neutral' – ie written in broad language to capture future technological developments as well as

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[50] TUC Congress 2016, *Preliminary Agenda*, 11–14 September 2016, 21.

[51] See below at IV.B.

[52] Anderson, 'The Investigatory Powers Act 2016 – an exercise in democracy' (n 41).

[53] Ibid.

[54] Ibid.

[55] Hintz and Brown, 'Digital Citizenship and Surveillancel Enabling Digital Citizenship? The Reshaping of Surveillance Policy After Snowden' (n 32) 796.

[56] P Bernal, 'Data gathering, surveillance and human rights: recasting the debate' (2016) 2 *Journal of Cyber Policy* 243, 244.

[57] Ibid, 248–250.

the services currently in use. However, some of the Act's engagement with technological matters confounds even technologists. The chief example is 'internet connection records'. For the Home Office, the requirement to retain ICRs is the only novel power for which the Act provides. However, there remains little clarity on what ICRs are and how they can be collected. Some technologists consider that they do not constitute an existent type or category of data – with the result that service providers will have to collect far more data than appears on the face of the Bill.

Given the challenges for civil society engagement the responsibility for Parliament is even greater. The Constitution relies on the Opposition to hold the government to account. And yet the role of civil society contrasts sharply with that of the Labour Party. On 9 September 2015, a group of Labour Party MPs and trade unionists, including influential figures such as Tom Watson MP and Len McCluskey of UNITE, wrote to *The Guardian* to urge the next Labour leader to be ready to deal with the IP Bill, and to ensure there is no 'unnecessary trade-off between security and privacy'. They explicitly invoked 'the historical surveillance and subversion of the union movement'.[58] It is remarkable, then, that the official policy of the Labour Party was to welcome the Bill on first reading, abstain on second reading, and support it on third reading. The Leader of the Labour Party, Jeremy Corbyn, was absent for the Commons votes on the Bill.[59] The chief resistance in the House of Commons came from the Liberal Democrats, Scottish Nationalist Party, and Caroline Lucas of the Green Party.

The Labour Party's failure to oppose the Bill led to criticism from fellow parliamentarians and in the press.[60] Corbyn was not the only member of the Party to face direct criticism. Shadow Home Secretary, Diane Abbott MP, as well as Shadow Attorney General, Baroness Shami Chakrabarti, were also singled out. The criticism referred to past unlawful

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[58] 'Investigatory powers bill must be a priority for Labour's next leader' *The Guardian* (London, 9 September 2015).

[59] R Williams, 'How Tim Farron, Theresa May, and Jeremy Corbyn voted on mass surveillance' *iNews* (London, 31 May 2017).

[60] K Fiveash, 'Can We Please Stop Peddling the Myth that Labour Opposes Gov't Spying' (*Ars Technica*, 19 October 2016) https://arstechnica.com/tech-policy/2016/10/ipb-stop-peddling-myth-labour-opposed-surveillance/; B Paddick, 'The Lib Dems oppose this snooper's charter. Why doesn't Labour?' *The Guardian* (London, 19 October 2016).

surveillance of Abbott, and well as Chakrabarti's outspoken response to surveillance as director of Liberty. The reason for this silence, in the words of one commentator, 'remains a mystery'.[61] Andy Burnham MP did sponsor an amendment supportive of trade unions which the government accepted – but its value, as we will see, is limited.

The absence of Labour Party leadership of opposition to the Bill gives the lie to the promises of *The Digital Democracy Manifesto*, launched by Jeremy Corbyn in August 2016, during the Labour leadership election.[62] It also renders risible the claim in the party's 2017 election manifesto, *For the Many Not the Few*, that in relation to civil liberties and investigatory powers, '[the Party] will reintroduce effective judicial oversight over how and when they are used, when the circumstances demand that our collective security outweighs an individual freedom'.[63] Aside from the indecipherable grammar the statement rings hollow.

Indeed, at least since the 11 September 2001 attacks, surveillance, like counter-terrorism,[64] has been a 'bi-partisan' policy field. The two parties which have led every government since the end of World War II are largely aligned on the issue. Andy Burnham MP admitted as much when he acknowledged that 'in the past—*under Governments of both colours, it has to be said*—trade unions have indeed been monitored'.[65]

The Labour Party relied on amendments to the legislation to justify their support for it at third reading.[66] However, these amendments, as shown in Part IV below, fail to address

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[61] P Bernal, 'How the UK passed the most invasive surveillance law in democratic history' (*The Conversation*, 23 November 2016) https://theconversation.com/how-the-uk-passed-the-most-invasive-surveillance-law-in-democratic-history-69247.

[62] J Corbyn, *The Digital Deomcracy Manifesto* (August 2016) https://d3n8a8pro7vhmx.cloudfront.net/corbynstays/pages/329/attachments/original/1472552058/Digital_Democracy.pdf?1472552058.

[63] The Labour Party, *For The Many, Not the Few: The Labour Party Manifesto 2017* (Labour Party, London, 2017) https://labour.org.uk/manifesto/ 77.

[64] L Morgan and F de Londras, 'Is There A 'Conservative' Counter-Terrorism?' (2018) 29 *King's Law Journal* 187.

[65] *Hansard* 6 June 2016 vol 611, col 955 (emphasis added).

[66] K Fiveash, 'Investigatory Powers Bill passes through Commons after Labour backs Tory spy law' (*Ars Technica*, 6 July 2016) https://arstechnica.com/tech-policy/2016/06/labour-backs-principle-of-investigatory-powers-bill/.

several serious concerns with the legislation. Furthermore, governments have long known the lesson of the Incitement to Disaffection Bill of 1934, of which a contemporary commentator observed '[it] reminds one of the traditional horse-dealer…Place your demands sufficiently high, and you can graciously make numerous concessions and still get all you want'.[67]

IV. Some Implications for Social Democrats

The IPA is extensive and a comprehensive analysis is beyond the scope of this chapter.[68] It includes powers for the targeted and bulk interception of communications, requirements on telecommunications service providers to retain communications data (records of telephone and internet use) for access by various governmental offices and agencies. It also includes powers for targeted and bulk 'equipment interference' (ie hacking). There is much in the Act which empowers state surveillance. The principal safeguards against such powers are now found in the Investigatory Powers Commissioner's Office (ICPO). Amongst the Act's innovations is the requirement that (most but not all) warrants to exercise powers under the Act must be approved first by the Home Secretary and then by a Judicial Commissioner.[69] Three aspects of the Act's impact on social democracy are examined, each of which were the subject of lobbying during the legislative process. These are the protections of legal professional privilege, journalistic material, and trade union data.[70] The legal profession is required, on ethical grounds, to be independent (see for example the Core Code of Conduct for barristers). Furthermore, for the press, and trade unions, to serve their societal functions, they must be independent of the state. The erosions of the special legal protections afforded to these institutions weakens their capacity to be agents of social democratic reform. And, as we shall see, the IP Act continues that erosion.

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[67] *The New Statesman*, 14 July 1934.

[68] S McKay, *Blackstone's Guide to the Investigatory Powers Act 2016* (Oxford, OUP, 2017).

[69] See in particular Pt 8, ch 1. For a critical consideration see Scott, 'Hybrid institutions in the national security constitution: the case of the Commissioners' (n 45).

[70] There is not space here to consider the question of confidentiality of MPs communications.

A. Legal Professional Privilege (LPP)

The legal profession is not necessarily an instrument of social democracy – as Ewing makes clear. However, the capacity of lawyers to protect their clients, in particular through legal privilege, can be of benefit to social democrats. That trade unionists, or journalists, for example, can access confidential legal advice is essential to their performance of their roles. And the existence of the Haldane Society of Socialist Lawyers is evidence that lawyers may organise in pursuit of social democracy.[71]

The justification for LPP doesn't focus on the legal professional but on the client. It is, as Lord Phillips put it, 'the fundamental requirement that a man should be able to speak freely and frankly to his lawyer'.[72] In *re McE (Northern Ireland)* the House of Lords had to consider whether it was lawful to target LPP communications for interception.[73] RIPA did not mention LPP but some protections for privilege were found in a Code of Practice. The Lords held that as RIPA did not prohibit the targeting of LPP communications then it was lawful to do so.

The IPA, at first, was set to follow this practice, because the draft Bill only required that a Code of Practice address 'legally privileged material'.[74] A joint briefing prepared by The Law Society and the General Counsel of the Bar, amongst others, identified several failings of the Bill. These included an absence of adequate protections for privilege in relation to communications data, when an individual outside the UK communicates with a lawyer inside the UK, and when warrants are modified. The briefing called for a statutory requirement to avoid the capture of privileged material as well an obligation to report annually on the number

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[71] See: www.haldane.org.

[72] Lord Phillips of Worth Matravers in re McE (Northern Ireland) [2009] UKHL 15, [2009] 1 AC 908 [10].

[73] Ibid.

[74] Secretary of State for the Home Department, *Draft Investigatory Powers Bill* (Cmd 9152, 2015) Sch 6, clause 4.

of privilege authorisations granted.[75] Not all of these recommendations were agreed but amendments in the House of Lords introduced some safeguards.[76]

These are found in section 27 of the IPA. A warrant application must state that its purpose(s) include the interception or examination of 'items subject to legal privilege'.[77] It can only be done in the interests of national security or to prevent death or serious injury.[78] The decision-maker on the warrant must have regard to the public interest in confidentiality of LPP material.[79] For the warrant to be lawful there must be 'exceptional and compelling circumstances'[80] which make it necessary and specific arrangements for its 'handling, retention, use, and destruction'.[81] The Act also makes explicit reference to the 'iniquity exception': the rule that legal privilege does not attach to communications which aim to further a criminal purpose.[82]

In comparison with RIPA, the IPA makes explicit that law enforcement authorities and intelligence agencies may target LPP material. It also makes the welcome shift of protections from the Code of Practice to the legislation itself. Nevertheless, the Act confirms that privilege is under strain by telecommunications surveillance, which may have a chilling effect on communications between clients and their lawyers. Chantal-Aimée Doerries QC, Chairman of the Bar Council, said: 'sadly what was passed in the end fell significantly short of what we would consider sufficient to protect this important and fundamental right, underpinning the

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[75] Bar Council of England and Wales, and Others, *Joint Briefing on Legal Privilege for House of Lords Second Reading of the Investigatory Powers Bill*, June 2016.

[76] For consideration of the Lords amendments see E King and D Lock, 'Investigatory Powers Bill: Key Changes Made by the Lords' (*UK Constitutional Law Blog,* 1 December 2016) https://ukconstitutionallaw.org/2016/12/01/eric-king-and-daniella-lock-investigatory-powers-bill-key-changes-made-by-the-lords/.

[77] IPA 2016, s 27(2).

[78] Ibid, s 27(6).

[79] Ibid, s 27(3).

[80] Ibid, s 27(4)(a).

[81] Ibid, s 27(4)(b).

[82] Ibid, s27(11)-(12).

rule of law'.[83] The matter is not only of national concern. The UK is a leader in global legal services. There is much international public interest work done by UK firms and chambers for overseas civil society groups. As Ben Jaffey QC writes: 'when my clients in national security cases ask me 'can I speak to you confidentially', my answer is still 'no'.'[84]

B. Journalistic Material

The protection of journalists finds legal expression in Article 10, ECHR. In *Goodwin v United Kingdom* the Court held that to force journalists to reveal their sources would have a chilling effect on the press' ability serve as a public watchdog.[85] In *Sanoma Uitgevers BV* the Court developed its jurisprudence on safeguards. Principal amongst these is the 'guarantee of review by a judge or other independent and impartial decision making body'.[86] Such a review should take place *before* the journalist is compelled to reveal the source.

The IP Act likely fails to live up to these standards. The draft Bill did not protect journalists in relation to interception powers – but did provide that Judicial Commissioner approval was necessary for access to communications data when such access was for the purpose of identifying a journalist's source.[87] In response to the Bill's publication, the NUJ launched a 'Speak in Safety' campaign.[88] The Press Gazette shifted the focus of its campaign, 'Save Our Sources', from RIPA to the IP Bill.[89] Submissions to parliamentary committees were

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[83] The remark was made at the 10th Annual Rule of Law Lecture as quoted in J van der Luit-Drummond, 'UK's "world-leading" spy powers "a beacon for despots"' (*Solicitor's Journal*, 29 November 2016) www.solicitorsjournal.com/news/201611/uk%E2%80%99s-%E2%80%98world-leading%E2%80%99-spy-powers-%E2%80%98-beacon-despots%E2%80%99.

[84] B Jaffey QC, 'Legal Professional Privilege in jeopardy' in Big Brother Watch (ed), *The State of Surveillance in 2018* (London, Big Brother Watch, 2018).

[85] *Goodwin v United Kingdom* (1996) 22 *EHRR* 123. See further *Sanoma Uitgevers BV v The Netherlands* [*2010*] ECHR 1284.

[86] *Sanoma Uitgevers BV* (n 85) para 90.

[87] Secretary of State for the Home Department, *Draft Investigatory Powers Bill* (n 74) clause 61.

[88] See: 'Safeguarding journalists and their sources' (*National Union of Journalists*, 20 October 2014) www.nuj.org.uk/campaigns/safeguarding-journalists-and-their-sources/.

[89] See: 'Save our Sources' (Press Gazette) www.pressgazette.co.uk/subject/save-our-sources/.

also made by Guardian News and Media, the Media Lawyers Association, News Media Association, Scottish PEN, as well as several individual journalists.[90] The NUJ sought 'automatic and mandatory prior notification [of requests for warrants]', 'an independent and judicial process', and 'mechanisms to challenge an application with the right of appeal'.[91] Few of the recommendations became part of the law.

The legislation as enacted makes several references to 'journalistic information' and 'confidential journalistic information'. [92] The protections are broadly analogous to those for LPP material. The safeguards therefore draw unfavourable comparisons with the Police and Criminal Evidence Act 1984 (PACE). Under PACE section 9 and schedule 1, journalists have the opportunity – prior to access – to challenge police access to journalistic materials.[93] The test for access to the material includes a requirement that there are reasonable grounds for belief that an indictable offence has been committed. These are much more stringent controls than appear in either RIPA or the IPA. The IPA's broad powers make it likely that journalists' communications can be swept up by bulk powers – for example of interception – with no means for the journalists to challenge the use of such powers in advance.

That better safeguards are necessary is clear. There is ample evidence of journalists' sources being at risk – even in democracies such as the UK.[94] Article 19 and English PEN, in their submission to the UK Universal Periodic Review, argue that bulk data collection contributes to a 'global chilling effect' on human rights organisations.[95] Even before the IPA, in October 2014, the Metropolitan Police used a power under RIPA to obtain journalist sources

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[90] For evidence given to the Joint Committee on the Draft Investigatory Powers Bill see: www.parliament.uk/draft-investigatory-powers/.

[91] National Union of Journalists, Written Evidence to Draft Investigatory Powers Bill Committee, 21 December 2015 (IPB0078), para 18.

[92] See IPA 2016, ss 28, 264.

[93] PACE 1984, s 9 and sch 1.

[94] UNESCO, *2018 DG Report on the Safety of Journalists and the Danger of Impunity*, CI-18/COUNCIL-31/6 REV.2 https://en.unesco.org/themes/safety-journalists/dgreport.

[95] Article 19 and English PEN, 'Joint submission by ARTICLE 19 and English PEN to the Universal Periodic Review of the United Kingdom' (5 October 2016) www.englishpen.org/campaigns/upr-2016-submission/.

in relation to the 'plebs' scandal.[96] It's little wonder, then, that Reporters Without Borders' 2019 World Press Freedom Index cites the IP Act as a 'menacing' threat to press freedom in the UK.[97]

C. Trade Union Data

Whatever might be said of lawyers and journalists, trade unions are central to social democracy.[98] Analyses of the role of unions in social democracy in the UK focus, for example, on the unions as sites of social democracy (ie in their own governance) and as promoters of social democracy through their influence over, and participation in, governance by the state.[99] Their political power, and the potential to disrupt both government and the economy, have led to trade unions being subject to (lawful and unlawful) surveillance throughout the past century.

The importance of trade union membership to the individual, and to collective society, has made the fact of such membership a 'special category' of personal data alongside 'religious or philosophical beliefs' and 'biometric data'.[100] As such it attracts particular protection in data protection law. The explicit mention of trade unions in the IP Act is limited to one (recurring) provision – an amendment accepted by the government in the House of Commons Report Stage. The provision states that, in relation to a range of different warrants (interception of communications, equipment interference, communications data, and bulk personal datasets), the fact that the information which would be obtained by the warrant relates to the activities of a trade union will not be sufficient to establish the necessity of the warrant.

As safeguards go this is rather flimsy. It does not prevent the capture of trade union data via (bulk) interception of communications, (bulk) equipment interference, retention and access to communications data or ICRs, or the issuance of technical capability notices. It merely notes that the necessity test for such activities is not met *solely* by the trade union

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[96] The scandal involved an allegation that Andrew Mitchell MP, the government Chief Whip, had called police officers 'plebs' during an altercation with them.

[97] See: www.rsf.org/en/united-kingdom.

[98] Ewing, 'Democratic Socialism and Labour Law' (n 1) *passim*.

[99] Ewing, 'Democratic Socialism and Labour Law' (n 1) 118.

[100] GDPR 2018, Art 9.

character of the data. Given inferences by the intelligence services and police force of links between trade unions and subversive organisations, it doesn't take much linguistic dexterity to conceive of a reason for access that does not rest *solely* on the trade union character of the data but nevertheless captures such data. Furthermore, the amendment does not prevent, and the Act provides no particular protection against, the general capture of data on trade union membership or activities in the context of other searches.

If the protections for journalistic and LPP materials are weak then the protection for 'trade union material' is negligible. This suggests that the trade union movement's seeming decision to leave lobbying to the NUJ was mistaken. The NUJ had distinct and significant concerns, set out below, which they sought to address. Apart from the NUJ, no trade unions gave evidence to the Draft Investigation Powers Bill Committee in Parliament.[101] The Labour Campaign for Human Rights, a signatory to the 2015 letter to *The Guardian*, did give evidence, and drew attention to surveillance of unions throughout the last century. However, it did not call for any particular protections for trade unions.[102]

That trade unions might have been preoccupied with other legislation – the Trade Union Bill (now Act) 2016 – in the early stages of consideration of the IP Bill might provide some explanation but little excuse. It also doesn't explain why the Labour Party was, in general, so broadly receptive to a Bill that its Leader, Shadow Attorney General, and Shadow Home Secretary, had all spoken about in such bold terms. As one commentator puts it: Another asks: 'If social democrats are too frightened to stand up for what they believe in, then why bother voting for them?'[103]

V. (The Impossibility of) Conclusion

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[101] For the written and oral evidence see: www.parliament.uk/business/committees/committees-a-z/joint-select/draft-investigatory-powers-bill/publications/.

[102] Labour Campaign for Human Rights, 'Written Evidence to Investigatory Powers Bill Public Bill Committee' (IPB 52), 6 April 2016 https://publications.parliament.uk/pa/cm201516/cmpublic/investigatorypowers/Memo/IPB52.htm.

[103] M Harris, 'Shami Chakrabarti and Jeremy Corbyn were the loudest critics of the Snooper's Charter – but now they're in power, they've gone quiet' *The Independent* (London, 11 October 2016).

The Act was always likely to face legal challenge. Liberty's response was 'See You In Court'.[104] Before Liberty made it to court, however, Privacy International were successful in getting the IPT to refer several questions to the CJEU on bulk data collection.[105] During the legislative process which led to the IPA, the government admitted that since the late 1990s, GCHQ had been using section 94 of the Telecommunications Act 1984 as the legal basis for bulk data collection.[106] This was done on the basis of a very wide statutory power and by relying on a national security exemption to avoid laying the direction before Parliament. Privacy International challenge this practice. At the heart of the *Privacy International* reference is whether the principles which underpin the *Watson* judgment, which dealt largely with bulk data collection for the purposes of crime control, also apply in relation to national security.

Watson has already had an impact on the IP Act. In April 2018, in the first part of Liberty's challenge to the IP Act, the High Court held that, insofar as it relates to criminal justice, Part 4 of the Act was incompatible with EU law.[107] The decision implements in national law the reasoning of the *Watson* judgment. It holds that the issue of retention notices for crimes other than serious crimes, and access to retained data without prior review by a court or independent administrative body, are unlawful. Indeed, the government had conceded as much, and the principal dispute in the case was over the appropriate remedy. The Court gave until 1 November 2018 for the legislation to be amended. This was done by statutory instrument.[108]

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[104] Liberty, '"See You In Court' – Liberty Responds to Passing of the Snoopers" Charter' (17 November 2015) www.libertyhumanrights.org.uk/news/press-releases-and-statements/see-you-court-liberty-responds-passing-snoopers-charter.

[105] The CJEU case is pending: *Privacy International v Secretary of State for Foreign and Commonwealth Affairs and Others* (Case C-623/17).

[106] O Bowcott and R Norton-Taylor, 'UK spy agencies have collected bulk personal data since 1990s, files show' *The Guardian* (London, 21 April 2016).

[107] *R (Liberty) v Secretary of State for the Home Department and Secretary of State for Foreign and Commonwealth Affairs* [2018] EWHC 975 (Admin), [2019] QB 481.

[108] Data Retention and Acquisition Regulations 2018.

In September 2018, in *Big Brother Watch v United Kingdom*, the ECtHR held that bulk interception of communications under RIPA was contrary to the Convention.[109] In particular bulk interception of communications was a violation of Article 8, the regime to obtain communications data was a violation of Article 8 on grounds of the principle of legality, and bulk interception and communications data regimes were in violation of Article 10 for failure to safeguard journalistic material. The Court rejected claims in relation to sharing intelligence with foreign governments and in relation to the right to a fair trial and prohibition on discrimination. The judgment, if affirmed by the Grand Chamber, has implications for the IPA – though the latter legislation does, of course, have new oversight provisions.

In the final days of writing this chapter the High Court refused Liberty's latest application for judicial review of the IP Act.[110] The challenge was to the powers to request warrants for bulk interception, bulk and thematic equipment interference, bulk personal datasets, and bulk acquisition of communications data. Liberty had sought a declaration under section 4 HRA that the powers were incompatible with the ECHR. The Court's refusal notes that in *Big Brother Watch* the ECtHR had held that bulk powers per se could be lawful and that the case was to be heard by the Grand Chamber.[111]

Litigation is not the only reason that conclusion is impossible. If the legislative process for the IP Act gave cause to hope for a culture shift then that optimism has already been put to the test. In October 2017 the Home Secretary, Amber Rudd, said that even though she didn't understand end-to-end encryption, she would take steps to 'combat it'.[112] Indeed, draft regulations leaked earlier that year made clear that the government considered it possible to require service providers to remove such encryption (or at least provide a 'backdoor' to allow

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[109] *Big Brother Watch v United Kingdom*, App nos 58170/13, 62322/14 and 24960/15, judgment of 13 September 2018.

[110] *R (Liberty) v Secretary of State for the Home Department, Secretary of State for Foreign and Commonwealth Affairs* [2019] EWHC 2057 (Admin), [2019] 7 WLUK 488 ('*Liberty II*').

[111] Ibid [10].

[112] A Griffin, 'Amber Rudd admits she doesn't understand WhatsApp technology but intends to 'combat it' *The Independent* (London, 2 October 2017).

it to be circumvented) using the power to issue a 'technical capability notice' under the IP Act.[113] This question remains a live one as the 'Crypto-War' once more comes to the forefront of debate.[114]

In 2018 the IPCO appointed Eric Kind its first Head of Investigations. However, his appointment was ultimately prevented by the Home Office on 'national security grounds'.[115] Kind was told that this was because of his 'previous work and associations'.[116] He had, in the past, been Deputy Director of Privacy International and co-ordinator of the DSOU campaign on the IP Bill. David Anderson QC wrote 'As one of Eric's referees and admirers, I share his disappointment in the outcome'.[117]

In May 2019 the Home Secretary, Sajid Javid, laid before Parliament a statement which identified certain 'compliance risks' in MI5's treatment of data after its acquisition by interception.[118] The statement notes the Investigatory Powers Commissioner's Office concluded that the risks were serious, required mitigation, and ought to have been disclosed at an earlier stage. The decision on Eric Kind, as well as the 'compliance' failures at MI5, suggest that significant problems remain with the culture within law enforcement and intelligence agencies.

The Shadow Home Secretary, Diane Abbott, said the MI5 disclosure 'highlights the failure of government legislation, which only facilitates more and more public bodies having access to and gathering information'.[119] However, like the Leader of the Opposition, she was absent for the key votes on the IP Act. Ewing argues 'social democracy is different from liberal

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[113] C Baraniuk, 'Investigatory Powers: 'Real-time surveillance' in draft update' (*BBC News*, 5 May 2017) www.bbc.co.uk/news/technology-39817300. The power in question is in s 253, IPA 2016.

[114] See, eg, I Levy and C Robinson, 'Principles for a More Informed Exception Access Debate' (*Law Fare Blog*, 29 November 2018) www.lawfareblog.com/principles-more-informed-exceptional-access-debate.

[115] M Townsend, 'Home Office under fire for blocking new spy watchdog' *The Guardian* (London, 19 January 2019).

[116] Ibid.

[117] See: www.twitter.com/bricksilk

[118] S Javid MP, 'Investigatory Powers Act 2016: Safeguards Relating to Retention and Disclosure of Material', HCWS1552, 9 May 2019 www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-05-09/HCWS1552/.

[119] O Bowcott, 'MI5 accused of 'extraordinary and persistent illegality' *The Guardian* (London, 11 June 2019).

democracy … [i]t is about a difference balance of values…'.[120] He may be right. But social democrats, in particular in Parliament, ought to remember that however hard the struggle for social democracy, it will be harder still without civil liberties. Failure to stand up for protections for lawyers, journalists, and trade unions only makes them weaker agents of social democratic change.

The necessity of (certain) surveillance powers, acknowledged by Ewing and Gearty decades ago, remains subject to deep contestation by civil libertarians and technologists. It is difficult to adequately interrogate that necessity because of the inevitable secrecy which surrounds such powers and their use. There is agreement in Parliament, at least amongst the two largest parties. More fundamental suspicion has been left to smaller parties and to civil society. As a result, and contrary to Ewing's social democratic vision, it has taken judicial intervention to prompt Parliament to act. If social democrats do not do better when given such opportunities they run the risk of further misuses of the power – misuses that, in the past, have been to their own detriment.

[120] Ewing, 'Jeremy Corbyn and the Law of Democracy' (n 2) 343–344.